



6325-39

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 831 and 842

RIN 3206-AM20

Presumption of Insurable Interest for Same-Sex Domestic Partners

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is amending its regulations to add same-sex domestic partners to the class of persons for which an insurable interest is presumed to exist. The rule is designed to relieve federal employees with same-sex domestic partners from the evidentiary requirements in existing regulations for persons outside this class. Additionally, OPM is taking this step to recognize that individuals with same-sex domestic partners have the same presumption of an insurable interest in the continued life of employees or Members as the class of persons listed in the prior rule.

DATES: Effective [INSERT DATE OF PUBLICATION]

FOR FURTHER INFORMATION CONTACT: Kristine Prentice or Roxann Johnson, (202) 606-0299.

SUPPLEMENTARY INFORMATION:

Pursuant to the President's June 2, 2010, Memorandum for the Heads of Executive Departments and Agencies on Extension of Benefits to Same-Sex Domestic

Partners of Federal Employees, on Thursday, March 3, 2011, the Office of Personnel Management (OPM) published proposed regulations in the Federal Register at 76 FR 11684 requesting comments concerning proposed changes to 5 CFR 831.613(e) and 5 CFR 842.605(e). The proposed rule added persons in same-sex domestic partnerships to the relationships listed as having a presumption of an insurable interest under 5 CFR 831.613(e)(1) and 842.605(e)(1).

An employee or Member of Congress (Member) in good health may elect a reduced annuity at retirement to provide for an insurable interest annuity for anyone who has an insurable interest in the continued life of the employee or Member. Although an employee or Member can elect an insurable interest annuity for anyone with an insurable interest in the employee's or Member's continued life, the insurable interest regulations at 5 CFR 831.613(e)(1) and 842.605(e)(1) lists certain relationships where an insurable interest is presumed to exist.

Under the rule, the list of presumed insurable interest relationships included "spouses," "former spouses," "blood or adopted relatives closer than first cousins," "common law spouses," or "persons to whom employees or Members are engaged to be married." Prior to publication of this rule, a same-sex domestic partner of an employee or Member was not included in the list of relationships presumed to have an insurable interest in the continued life of the employee or Member. If an employee or Member elected an insurable interest annuity for a person who did not receive the presumption under 5 CFR 831.613(e)(1) and 5 CFR 842.605(e)(1), the employee or Member had to

submit affidavits along with his or her election to prove that the designated individual had an insurable interest in the continued life of the employee or Member.

As explained in the proposed rule, this final rule adds “same-sex domestic partners,” “former same-sex domestic partners,” and “persons with whom the employee or Member has agreed to enter into a same-sex domestic partnership” to the class of persons OPM will presume has an insurable interest in the continued life of the employee or Member. Thus, when an employee or Member elects a domestic partner for an insurable interest annuity, he or she will no longer need to submit affidavits as evidence that the individual has an insurable interest in the employee or Member.

The term “domestic partnership” has the same meaning as that ascribed to it in the Memorandum issued by OPM Director Berry on June 2, 2010, to Heads of Executive Departments and Agencies concerning Implementation of the President’s Memorandum Regarding Extension of Benefits to Same-Sex Domestic Partners of Federal Employees. See <http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=2982>.

Comments

We received several comments regarding the proposed rule, and they are addressed below. For the most part, OPM has not addressed comments it received that were aimed at substantive benefits and procedural issues outside the scope of the regulations. To the extent a comment recommended expanding or limiting the presumptive class, OPM has addressed those comments to clarify the intended scope of the rule.

One advocacy group commented that OPM should consider removing the requirement that domestic partners share the same residence. To meet the definition of “domestic partnership” a same-sex couple must show that they “maintain a common residence and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle).” The advocacy group acknowledged the proposed rule’s exception to the residency requirement but noted that the exception “is too narrow and likely discriminatory.”

The definition of “domestic partnership” contained in this regulation is drawn from guidance issued by OPM Director Berry on June 2, 2010, at the President’s request, determining whether to extend particular benefits to same sex partners pursuant to the President’s memorandum. See <http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=2982>. The guidance is intended to provide indicia that demonstrate a level of commitment in the relationship typically demonstrated by marriage. OPM has used a similar definition of a “domestic partnership” in its Absence and Leave as well as its Federal Long Term Care regulations, see 75 FR 33491 (June 14, 2010) (codified at 5 CFR 630.201) and 75 FR 30267 (June 1, 2010) (codified at 5 CFR 875.213), and OPM has tried to maintain consistency in this rule with the criteria necessary for proving the existence of a “domestic partnership” in the Absence and Leave and the FLTC regulations. Accordingly, we have determined not to adopt this suggestion.

Another advocacy group recommended that OPM consider expanding the existing presumption of a “blood or adopted relative closer than first cousins” to include children

with whom an employee or Member acts *in loco parentis*. This comment, however, goes beyond the scope of the proposed rule, which was not published for the purpose of amending the relationships already included in the list of presumed insurable interest relationships. The existing list has already undergone public notice and comment.

Furthermore, the regulation is sufficient to protect the interest of those employees or Members who are in an *in loco parentis* relationship with a child. If an employee or Member wishes to elect a child who would not otherwise receive the presumption of an insurable interest under 5 C.F.R. 831.613(e)(1) or 842.605(e)(1), the employee or Member may submit, along with the election, “affidavits from one or more persons with personal knowledge of the named beneficiary’s having an insurable interest in the employee or a Member.” These affidavits must “set forth the relationship, if any, between the named beneficiary and the employee or Member, the extent to which the named beneficiary is dependent on the employee or Member, and the reason why the named beneficiary may expect to derive financial benefit from the continued life of the employee or Member.” Thus, because employees and Members may elect children *in loco parentis* relationships with employees or Members under 5 CFR 831.613(e)(3) or 842.605(e)(3), their interests are sufficiently protected under this rule.

Several commenters suggested that same-sex couples who are legally married in jurisdictions that allow for same-sex marriage should be treated as “spouses” under 5 CFR 831.613(e)(1)(i) and 5 CFR 842.605(e)(1)(i), rather than as “domestic partners” as defined by this rule.

At this time, the Defense of Marriage Act, 1 U.S.C. 7, precludes us from adopting this suggestion. Same-sex couples in a state-recognized marriage, however, are likely to satisfy the definition of “domestic partnership,” and thus will be free to submit any relevant documentation for OPM’s consideration that they think is appropriate to show that they satisfy the definition of a domestic partnership.

One commenter suggested that the requirements providing that “domestic partners” must be “each other’s sole domestic partner and intend to remain so indefinitely,” and that “domestic partners” must “share responsibility for a significant measure of each other’s financial obligations” in order to qualify for the presumption under the amended rule are unnecessary because none of the other listed classes under 5 CFR 831.613(e)(1) and 842.605(e)(1) are subject to similar requirements.

The commenter, however, appears to misunderstand the difference between the standards for insurable interest and the standards for establishing the existence of a domestic partnership. The requirements that domestic partners must be each other’s sole domestic partner and intend to remain so indefinitely and that domestic partners must share responsibility for a significant measure of each other’s financial obligations are about establishing the existence of a “domestic partnership,” which then entitles the partners to the presumption of an insurable interest. Moreover, as stated above, the standards for establishing a domestic partnership are drawn from government-wide guidance issued by Director Berry pursuant to the President’s memorandum.

OPM received several comments expressing concern about the potential costs this rule would impose on the Federal Government. As a result, OPM believes it is necessary to clarify misconceptions some may have about the regulatory changes OPM has made to 5 CFR 864.613 and 842.605. The modifications to the pre-existing rule did not expand the class of persons whom employees or Members may elect for an insurable interest annuity, nor did the changes to the pre-existing rule alter who would bear the cost of providing the insurable interest annuity. The modification to the pre-existing rule merely included same-sex domestic partners in the class of persons that OPM will presume have an insurable interest in the continued life of the employee or Member. The cost of providing an insurable interest annuity continues to be borne primarily by the employee or Member. As a result, there is no significant cost increase, and OPM declines to change its decision to add same-sex domestic partners to the class of persons that OPM will presume have an insurable interest in the continued life of an employee or Member.

Similarly, OPM received a comment that suggested that the list of persons presumed to have an insurable interest is already too broad, and that OPM should exclude not only same-sex domestic partners from this presumption but also persons engaged to be married. This comment goes beyond the scope of the proposed rule, which was not published for the purpose of deleting any relationships already enumerated in the list of presumed insurable interest relationships. The existing list has already undergone public notice and comment. We also decline to make the suggested modification because the listed presumptions are consistent with the purpose of the law and OPM's longstanding administration of the insurable interest benefit.

Some commenters suggested that OPM provide retired individuals with a new opportunity to elect an insurable interest annuity for same-sex domestic partners as a result of the regulatory change. OPM declines to adopt this suggestion. The law providing for the election of an insurable interest annuity expressly provides that an insurable interest election must be made at retirement. The change to the rule at 5 CFR 831.613(e)(2)(i) and 842.605(e)(2)(i) does not provide employees or Members with a new election opportunity they did not previously have under the pre-existing rule. The regulatory change merely modifies the evidentiary requirements employees or Members must meet to elect an insurable interest annuity for a same-sex domestic partner.

One commenter suggests that imposing the requirement that couples show proof of the existence of a “same-sex domestic partner” undermines OPM’s stated purpose for publishing this rule—to relieve same-sex domestic partners of the evidentiary burdens imposed on individuals who do not fall within the presumptive classes. The commenter suggested that OPM has merely replaced one evidentiary burden imposed on same-sex domestic partnerships for another (i.e., the submission of affidavits from one or more persons with personal knowledge of the named beneficiary’s insurable interest in the employee or Member versus the submission of evidence that the designated beneficiary meets the definition of a “same-sex domestic partner” as defined by the rule).

OPM, however, has consistently required domestic partners to meet an evidentiary burden to establish that they are in a “domestic partnership.” That is because the relationship is not verifiable through government records (i.e., there is no marriage certificate) or, if such a certificate or record exist, OPM is unable to recognize same-sex

marriages for purposes of establishing eligibility to federal benefits. This burden is the same for a host of other Federal benefits. Upon meeting the evidentiary burden to establish a domestic partnership with respect to any benefit, the domestic partners would then be relieved of the additional burden they would have to meet (absent the presumption) to qualify for an insurable interest annuity.

We also received several comments suggesting that opposite-sex domestic partners should be included in the class of persons for whom OPM will presume an insurable interest exists. We decline to adopt this suggestion because opposite-sex domestic partners have the option of getting married in order to obtain the presumption. This is not an option for same-sex couples with respect to Federal benefits.

Some commenters expressed concerns that the regulatory change would invite abuse or fraud. Some were concerned, for example, that there were insufficient safeguards to preclude individuals who were not in a “domestic partnership” as defined by the rule to be able to claim benefits they would not otherwise be entitled to receive.

OPM believes, however, that sufficient safeguards are in place to discourage individuals from fraudulently claiming the presumption as a domestic partner of an employee or Member. Section 831.613(viii) of the rule, for example, requires that parties are “willing to certify, if required by OPM, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001.” The provision under 18 U.S.C. 1001, provides that if an applicant intentionally makes false

or misleading statements, certifications, or responses on government forms, he or she may be subject to a fine of not more than \$10,000 or imprisonment of not more than five years.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect retirement payments to retired employees or Members who elect an insurable interest annuity for a person with whom they have entered into a domestic partnership or civil union.

List of Subjects in 5 CFR Parts 831 and 842

Administrative practice and procedure, Air traffic controllers, Alimony, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management.

John Berry,
Director.

For the reasons discussed in the preamble, the Office of Personnel Management is amending 5 CFR parts 831 and 842 as follows:

PART 831—RETIREMENT

1. The authority citation for part 831 continues to read as follows:

Authority: 5 U.S.C. 8347; Sec. 831.102 also issued under 5 U.S.C. 8334; Sec. 831.106 also issued under 5 U.S.C. 552a; Sec. 831.108 also issued under 5 U.S.C. 8336(d)(2); Sec. 831.114 also issued under 5 U.S.C. 8336(d)(2), and Sec. 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Sec. 831.201(b)(1) also issued under 5 U.S.C. 8347(g); Sec. 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); Sec. 831.201(g) also issued under Secs. 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; Sec. 831.201(g) also issued under Secs. 7(b) and (e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.201(i) also issued under Secs. 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.204 also issued under Sec. 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by Sec. 153 of Pub. L. 104–134, 110 Stat. 1321; Sec. 831.205 also issued under Sec. 2207 of Pub. L. 106–265, 114 Stat. 784; Sec. 831.206 also issued under Sec. 1622(b) of Pub. L. 104–106, 110 Stat. 515; Sec. 831.301 also issued under Sec. 2203 of Pub. L. 106–265, 114 Stat. 780; Sec. 831.303 also issued under 5 U.S.C. 8334(d)(2) and Sec. 2203 of Pub. L. 106–235, 114 Stat. 780; Sec. 831.502 also issued under 5 U.S.C. 8337, and under Sec. 1(3), E.O. 11228, 3 CFR 1965–1965 Comp. p. 317; Sec. 831.663 also issued under 5 U.S.C. 8339(j) and (k)(2); Secs. 831.663 and 831.664 also issued under Sec. 11004(c)(2) of Pub. L. 103–66, 107 Stat. 412; Sec. 831.682 also issued under Sec. 201(d) of Pub. L. 99–251, 100 Stat. 23; Sec. 831.912 also issued under Sec. 636 of Appendix C to Pub. L. 106–554, 114 Stat. 2763A–164; Subpart P also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042; Subpart V also issued under 5 U.S.C.

8343a and Sec. 6001 of Pub. L. 100–203, 101 Stat. 1330–275; Sec. 831.2203 also issued under Sec. 7001(a)(4) of Public Law 101–508, 104 Stat. 1388–328.

2. In 831.613, revise paragraph (e) to read as follows:

§ 831.613 Election of insurable interest annuities.

* * * * *

(e) An insurable interest annuity may be elected to provide a survivor benefit only for a person who has an insurable interest in the retiring employee or Member.

(1) An insurable interest is presumed to exist with--

(i) The current spouse;

(ii) The current same-sex domestic partner;

(iii) A blood or adopted relative closer than first cousins;

(iv) A former spouse;

(v) A former same-sex domestic partner;

(vi) A person to whom the employee or Member is engaged to be married, or a person with whom the employee or Member has agreed to enter into a same-sex domestic partnership;

(vii) A person with whom the employee or Member is living in a relationship that would constitute a common-law marriage in jurisdictions recognizing common-law marriages;

(2) For purposes of this section, the term “same-sex domestic partner” means a person in a domestic partnership with an employee or annuitant of the same sex and the

term “domestic partnership” is defined as a committed relationship between two adults, of the same sex, in which the partners—

- (i) Are each other’s sole domestic partner and intend to remain so indefinitely;
- (ii) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);
- (iii) Are at least 18 years of age and mentally competent to consent to contract;
- (iv) Share responsibility for a significant measure of each other’s financial obligations;
- (v) Are not married or joined in a civil union to anyone else;
- (vi) Are not the domestic partner of anyone else;
- (vii) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed; and
- (viii) Are willing to certify, if required by OPM, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of

the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001.

(3) When an insurable interest is not presumed, the employee or Member must submit affidavits from one or more persons with personal knowledge of the named beneficiary's insurable interest in the employee or Member. The affidavits must set forth the relationship, if any, between the named beneficiary and the employee or Member, the extent to which the named beneficiary is dependent on the employee or Member, and the reasons why the named beneficiary might reasonably expect to derive financial benefit from the continued life of the employee or Member.

(4) The employee or Member may be required to submit documentary evidence to establish the named beneficiary's date of birth.

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PART 842— FEDERAL EMPLOYEES RETIREMENT SYSTEM— BASIC ANNUITY

3. The authority citation for part 842 continues to read as follows:

Authority: 5 U.S.C. 8461(g); Secs. 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); Sec. 842.104 also issued under Secs. 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); Sec. 842.106 also issued under Sec. 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by Sec. 153 of Pub. L. 104–134, 110 Stat. 1321–102; Sec. 842.107 also issued under Secs. 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251, and Sec. 7(b) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.108 also issued under Sec. 7(e) of Pub. L. 105–274,

112 Stat. 2419; Sec. 842.109 also issued under Sec. 1622(b) of Public Law 104–106, 110 Stat. 515; Sec. 842.208 also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042; Sec. 842.213 also issued under 5 U.S.C. 8414(b)(1)(B) and Sec. 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Secs. 842.304 and 842.305 also issued under Sec. 321(f) of Pub. L. 107–228, 116 Stat. 1383, Secs. 842.604 and 842.611 also issued under 5 U.S.C. 8417; Sec. 842.607 also issued under 5 U.S.C. 8416 and 8417; Sec. 842.614 also issued under 5 U.S.C. 8419; Sec. 842.615 also issued under 5 U.S.C. 8418; Sec. 842.703 also issued under Sec. 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388; Sec. 842.707 also issued under Sec. 6001 of Pub. L. 100–203, 101 Stat. 1300; Sec. 842.708 also issued under Sec. 4005 of Pub. L. 101–239, 103 Stat. 2106 and Sec. 7001 of Pub. L. 101–508, 104 Stat. 1388; Subpart H also issued under 5 U.S.C. 1104; Sec. 842.810 also issued under Sec. 636 of Appendix C to Pub. L. 106–554 at 114 Stat. 2763A–164; Sec. 842.811 also issued under Sec. 226(c)(2) of Public Law 108–176, 117 Stat. 2529; Subpart J also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042.

4. In § 842.605, revise paragraph (e) to read as follows:

§ 842.605 Election of insurable interest rate.

* * * * *

(e) An insurable interest rate may be elected to provide a survivor benefit only for a person who has an insurable interest in the retiring employee or Member.

(1) An insurable interest is presumed to exist with—

(i) The current spouse;

- (ii) The same-sex domestic partner;
- (iii) A blood or adopted relative closer than first cousins;
- (iv) A former spouse;
- (v) A former same-sex domestic partner;
- (vi) A person to whom the employee or Member is engaged to be married, or a person with whom the employee or Member has agreed to enter into a same-sex domestic partnership;
- (vii) A person with whom the employee or Member is living in a relationship that would constitute a common-law marriage in jurisdictions recognizing common-law marriages;

(2) For purposes of this section, the term “same-sex domestic partner” means a person in a domestic partnership with an employee or annuitant of the same sex, and the term “domestic partnership” is defined as a committed relationship between two adults, of the same sex, in which the partners—

- (i) Are each other’s sole domestic partner and intend to remain so indefinitely;
- (ii) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);
- (iii) Are at least 18 years of age and mentally competent to consent to contract;

(iv) Share responsibility for a significant measure of each other's financial obligations;

(v) Are not married or joined in a civil union to anyone else;

(vi) Are not the domestic partner of anyone else;

(vii) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed; and

(viii) Are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001, and that the method for securing such certification, if required, shall be determined by the agency.

(3) When an insurable interest is not presumed, the employee or Member must submit affidavits from one or more persons with personal knowledge of the named beneficiary's having an insurable interest in the employee or Member. The affidavits must set forth the relationship, if any, between the named beneficiary and the employee or Member, the extent to which the named beneficiary is dependent on the employee or Member, and the reasons why the named beneficiary might reasonably expect to derive financial benefit from the continued life of the employee or Member.

(4) The employee or Member may be required to submit documentary evidence to

establish the named beneficiary's date of birth.

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